Supreme Court, U.S.
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No.

In The
Supreme Court Of The United States
October Term, 1996

DOMINICK LOPREATO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE APPELLATE COURT EMPLOYED THE PROPER STANDARDS IN DETERMINING WHETHER PROPER NOTICE UNDER RULE 32 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WAS GIVEN IN THE SENTENCING COURT'S SUA SPONTE DECISION TO MAKE AN UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES.

2. WHETHER DUE PROCESS OF LAW AS PROVIDED FOR UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION REQUIRES REMAND IN THOSE CASES FOR WHICH PROPER NOTICE OF A POSSIBLE DEPARTURE FROM THE GUIDELINES WAS NOT GIVEN PRIOR TO SENTENCING WHERE THERE WAS A GUIDELINE DEPARTURE.

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In The

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October Term, 1996

DOMINICK LOPREATO,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

The Petitioner, Dominick Lopreato, prays that a writ of certiorari issue to review the decision entered on May 8, 1996, in U.S.A. v. Lopreato, 83 F. 3d 571 (2nd Cir. 1996). That decision by the Second Circuit affirmed the sentencing rulings of the District Court for Connecticut, Daly, J. The decision of the Second Circuit can be found in the Appendix at A-1.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is cited as United States of America v. Dominick Lopreato, 83 F.3d, 571 (2nd Cir. 1996).

STATEMENT OF JURISDICTION

The petition seeks review from the judgment of the United States Court of Appeals for the Second Circuit. The judgment was entered by the Court on May 8, 1996. (Appendix A.) The jurisdiction of this Court is involved under 28 U.S.C.S., Section 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital or other

infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person by subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Rule 32, Fed. Rules of Crim. Proc. is set forth in appendix B.

STATEMENT OF THE CASE

Petitioner, Dominick Lopreato, served as co-chairman and trustee of the Connecticut Laborers' Pension Fund (CLPF), an employee pension fund plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C., Section 1002(2) (ERISA). As such, he was prohibited from receiving, or agreeing to receive any fee, kickback, commission, gift, loan, money or thing of value because of or with intent to be influenced with respect to any of the actions, decisions, or other duties relating to any question or case concerning such plan. 18 U.S.C., Section 1954(1).

On two occasions, the Board of Trustees of CLPF, including the Petitioner, voted unanimously to invest a total of more than five million dollars in securities offered by Colonial Realty Company, (Colonial). The CLPF never

received a return on its investment and the principal was lost. There was never a claim that Mr. Lopreato took any of that money. Colonial, for reasons unassociated with the Petitioner, filed for bankruptcy; the two principal owners, unbeknownst to Mr. Lopreato had engaged in fraudulent acts and "bled the company dry".

The government's case consisted of allegations that Mr. Lopreato was contacted by a minor partner of Colonial in 1988 and proposed that CLPF invest in a debt security, Colonial Metro Zero Coupon Mortgage Trust, (Metro Zero), which was being offered by Colonial. According to the government's evidence the Petitioner agreed to assist in the sale of these securities to CLPF in exchange for a cash percentage of the sale. Subsequent to the sale of two million dollars in Metro Zero securities to CLPF it was alleged that Mr. Lopreato received a fee of between

$45,000-$50,000.

In 1989 the government claimed that there was a second offering to the CLPF in the form of securities in the Colonial Gold Zero Coupon Limited Partnership, (Gold Zero). In exchange for his assistance in this transaction the government claimed that Mr. Lopreato received $150,000, (5% of 3 million dollars), in September of 1989.

The government also claimed that in 1990 the Petitioner made arrangements for another pension fund, the Albany Laborers' Pension Fund, (ALPF), to invest in Colonial Constitution Zero Coupon Limited Partnership, (Constitution Zero). While not a trustee in that pension fund, it was claimed that he received an additional $150,000 in 1990 from Colonial for his efforts. The government also claimed that he failed to report any of this income on his federal tax returns.

The government obtained convictions against the petitioner after a jury trial on two counts of violating 18 U.S.C., Section 1954, bribe taking; three counts of violating 26 U.S.C., Section 7206(1), filing a false tax return; one count of violating 18 U.S.C., Section 371, conspiring; and two counts of violating 18 U.S.C. Section 1621(1), perjury.

This occurred in May of 1995.

At the end of July, 1995, the petitioner was sentenced before the late Honorable T.F. Gilroy Daly at Waterbury, Connecticut, wherein the Court imposed a sentence of 51 months to serve. The Court also sua sponte departed upwards by imposing a fine in the amount of $250,000, even though the guideline range called for a fine in the $10,000 to $100,000 range.

Prior to sentencing the Court did not notify the parties under Rule 32, Fed. R. Crim. Proc., that it was contemplating an

upwards departure; nor did the Court give prior notice as to the grounds for any such departure. The government did not seek an upward departure on any such fine. The presentence report failed to note any specific grounds for an upward departure. The only reference made in the presentence report was a restatement of the statutory penalty provisions found in the U.S. Code. No grounds were specifically offered in the presentence report which might warrant an upward departure.

At the sentencing the Court did sua sponte depart from the guideline range and impose a quarter of a million dollar fine on the Petitioner. The Court reviewed Petitioner's financial statement and perceived that he could afford such a fine. The Court never factored into its consideration the immediate statutory I.R.S. high tax liability impact such conviction would have on the Petitioner,

including a 75% penalty for tax evasion coupled with interest from 1989 that would have wiped out any savings that the Petitioner may have had. (The tax bill alone would have taken away any ability to pay a fine such as was imposed).

The Petitioner appealed his conviction and subsequent penalties to the United States Court of Appeals for the Second Circuit. Among the issues raised on appeal was whether the distinct court acted consistent with Rule 32, Fed. Rules of Crim. Proc., coupled with Burns v. United States, 501 U.S. 129, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991).

The Second Circuit affirmed the sentence imposed by the district court. On the issue of notice the Appellate Court concluded that notice is sufficient merely because in the presentence report there was a restatement of the penalties authorized by the statutes. No where in

the report was there notice that the Court was contemplating an upward departure; nor was there any indication of the grounds upon which the Court might employ to depart. The Second Circuit further concluded that even if proper notice was lacking under Burns, any error of the district court was "harmless beyond a reasonable doubt" because at the time of sentencing Judge Daly did refer to some liability the Petitioner was exposed to by Colonial trustees and those of the CLPF. The Second Circuit concluded that because in passing the district court referred to some exposure and discounted the same, that any error was harmless.

It is from this history coupled with the misapplication of Rule 32 and Burns v. United States, supra, coupled with the Second Circuit's interpretation of Burns which is inconsistent with that of several other circuits, which form the basis for

this petition.

REASONS FOR GRANTING THE WRIT

I.

THE APPELLATE COURT EMPLOYED STANDARDS INCONSISTENT WITH RULE 32 AND BURNS V. UNITED STATES IN AFFIRMING THE DISTRICT COURT'S SUA SPONTE GUIDELINE DEPARTURE.

This Court in Burns v. United States, supra, obligated the district courts prior to the sentencing hearing to furnish advance notice of its intent to depart from the Sentencing Guidelines. This Court noted that because the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess as to when or on what grounds a district court might depart, much less to comment on such a possibility in a coherent way. Supra, at pp. 136-137. It is significant to note that this Court mandated that notice must specifically identify the grounds upon on which the

district court is contemplating an upward departure; that any violation of this procedure at a minimum constitutes a violation of the notice requirements of Rule 32.

A thorough review of the opinion of the Second Circuit fails to find any reference to this Court's mandate that prior to departing from the Guidelines, grounds for the contemplated departure must be given in advance of the sentencing date if the adversarial process is to have any meaning. The right to be heard has little reality or worth unless one is informed that a departure is contemplated; this, according to Burns, is especially true when the decision in question is a sua sponte departure from the Guidelines, supra, at 136. The Second Circuit's only retort to the claim of lack of notice by the district court was the finding that

because reference was made in the 40 plus paragraph presentence report as to the statutory limits of penalties, including a $250,000 alternative fine provision, that some how this constitutes sufficient notice under Burns.

> "In Burns, the sentencing Court had sua sponte departed upward, when no grounds for doing so were listed in the PSR Id. at 135. Thus Lopreato's invocation of Burns rings somewhat hollow. Indeed, the Burns Court distinguished 'the ordinary case, (in which) the presentence report on the Government's own recommendation will notify the defendant that an upward departure will be at issue.' Id. Although the PSR in this case stated only that an alternative fine was available, without supporting facts, Lopreato was significantly more aware the Court might depart upward than was the defendant in Burns." (emphasis added) U.S. v. Lopreato, 83 F. 3d 571, 577 (2nd Cir. 1996).

The Second Circuit's ruling flies in the face of Burns as well as several other circuit courts decisions by changing the minimum notice standards. Additionally, it misapplied the Eleventh Circuit's decision in United States v. Paslay, 971

F. 2d 667, 674 (11 Cir. 1992). The Second Circuit in a back handed manner concedes lack of proper notice when it noted that even if notice was lacking under Burns, this error was harmless beyond a reasonable doubt, citing the Paslay case.

Ironically, while citing the Paslay case, the Second Circuit failed to adhere to Paslay's logic. In Paslay, there was no notice before the sentencing hearing, at which the prosecutor urged an upward departure which subsequently occurred. In reversing the Eleventh Circuit, unlike the Second Circuit, following the rational laid out in Burns concluded that the specific grounds (not just a statement the applicable law) must be provided prior to the sentencing hearing for any upward departure. Id. at 673. (emphasis added.)

Unlike the Second Circuit, the Fourth Circuit also has ruled that a sua sponte court upward departure deprived a

defendant of proper notice. In the matter of U.S. v. Maxton, 940 F. 2d 1093 (4th Cir. 1991), the Court ruled that Rule 32 requires that the district court give the parties reasonable notice which must specifically identify the ground on which it is contemplating an upward departure. Id. at 106. Because the district court in that case failed to provide such notice, it vacated the sentence and remanded it for resentencing. Id.

Unlike the Second Circuit, the Seventh Circuit also found that when both notice and an "adequate explanation" was not given for an upward departure that in line with Burns, the sentence must be vacated and the matter remanded for a new sentencing. In the matter of U.S. v. Amaechi, 991 F. 2d 374, 379 (7th Cir. 1993) the Seventh Circuit reversed a district court sentencing after it had issued a life-long term of supervised

release, which was found to be an upward departure. The appellate court was deeply concerned about the lack of notice and the lack of providing the basis for the proposed departure. Id. (Also see U.S. v. Scroggins, Jr., 965 F.2d 480 (7th Cir. 1992).

Unlike the Second Circuit, the Tenth Circuit also adheres to the principals stated in the Burns case and recognizes that Rule 32, to be meaningful, requires advance notice of the ground for possible departure. In the matter of U.S. v. Kalady, 941 F.2d 1030 (10th Cir. 1991), in upholding the requirement, the Court held:

> "Without advance notice of the degree of departure contemplated, a defendant is unprepared to participate in the focused, adversarial resolution of the legal and factual issues relevant to fixing Guideline Sentences." Id. at 1097.

Finally, unlike the Second Circuit, the First Circuit also makes it quite

clear that the Burns decision requires advance notice if the district judge proposes to depart on any ground not earlier identified. United States v. Dolloph, 75 F. 3d 35, 37 (1st Cir. 1996).

II.

NOT HARMLESS ERROR-DUE PROCESS VIOLATION IN THAT THE DUE PROCESS CLAUSE OF FIFTH AMENDMENT REQUIRES BOTH ADEQUATE NOTICE AND A MEANINGFUL HEARING BEFORE IMPOSING GUIDELINE DEPARTURE SENTENCE.

The Second Circuit also referred to the so-called harmless error rule. Supra, at 577. The appellate court concluded that even if notice were lacking under Burns, that this error was harmless beyond a reasonable doubt. The Second Circuit failed to subscribe to the principal of this rule outlined in Chapman v. California, 386 U.S. 18, 22-24, 87 S.Ct. 824, 826-28, 17 L.Ed. 2d 705 (1967), wherein the burden to show that any error was harmless does not fall upon the victim of the error, Mr. Lopreato, but rather

upon the government, the beneficiary of the error. Id. at 24.

In the instant matter as a matter of Due Process of law property cannot be taken away by the government without proper notice and the opportunity to a meaningful hearing. As noted in Burns "...were one to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." Supra, at 138.

The burden to show any harmless error (assuming the Court in U.S. v. Paslay, supra, was correct about even using the harmless error rule) was twisted around by the Second Circuit and placed squarely on the shoulders of the petitioner:

> "The main argument Lopreato claims he would have made against imposition of the alternative fine had he been afforded notice was that he was already subject to lawsuits from the

> CLPF and Colonial's trustee in bankruptcy. However, the Court clearly contemplated Lopreato's liability to Colonial's trustees in bankruptcy and to the CLPF. It stated, in choosing not to order restitution, that "in view of the fine and the bankruptcy trustee's claim, and because I do not want to make a preference out of the Union over any other claimant in bankruptcy proceedings, I do not order that restitution be made." Any argument that the Court did not consider Lopreato's other potential liabilities is belied by this statement. Thus, any error was harmless beyond a reasonable doubt." U.S. v. Lopreato, supra, at 578.

In sum the Second Circuit was saying that the petitioner had not met his burden of proof of demonstrating that the error was not harmless. It is axiomatic that due process of law mandates that property cannot be taken without adequate notice and a meaningful opportunity to be heard. The harmless error argument must factor into consideration the due process afforded under the Fifth Amendment. It was not the job of the petitioner to

demonstrate harmless error, but rather that of the government. If proper notice and grounds had been given in advance of the hearing, then the defendant/petitioner would have pointed out that with conviction of three tax evasion counts, federal law requires payment of under reported income, interest and penalties, which in the instant matter amounted to over $300,000.00 due the IRS. None of those facts were discussed or considered by the sentencing Court; had the Court done so, there would not have been sufficient funds available, as originally yet wrongly believed by the Court in passing sentence.

By ignoring the mandates issued in the Burns case, coupled with misapplying Rule 32 coupled with ignoring constitutional considerations of due process of law, couples with a misapplication of the "harmless error"

rule, the Second Circuit is acting inconsistent with this Court's decisions, federal criminal rules, and the hereinmentioned decisions of several other circuit courts. "If the district court fails to give reasonable notice, the defendant's due process rights have been violated and the appellate court must vacate the sentence and remand for resentencing." (emphasis added) U.S. v. Valentine, 21 F. 3d 395, 397 (11 Cir. 1994). (emphasis added.)

Ironically, the Second Circuit seems somewhat at odds with itself, or it has a double standard, depending upon whether one is dealing with the government or the defendant. In the matter of U.S. v. Alba, 933 F. 2d 1117, 1120 (2d Cir. 1991), the Second Circuit noted that on a downward departure there had been no advance notice of such a possibility by the Court; there they declared that such notice was indeed

required. Id. Further, even though the government never raised that as an issue on appeal, the Court chose not to limit those arguments, claiming:

> "Even though the government does not raise the notice issue on appeal as a form of reversal, it can scarcely be penalized for failing to raise issue before the district court of which it had no notice. Hence the government is entitled to advance these arguments on appeal." (emphasis added.) Id.

No where in the Alba case does the Second Circuit while ruling in favor of the government impose a "harmless error" rule; rather the court found error and remanded for further proceedings.

In sum, due process of law mandates reversal and remand for resentencing when a property right is taken from a defendant, such as a quarter of a million dollars, for which there was no advance notice given by the district court that it was contemplating such a departure from the Guidelines and where the district

court failed to give advance notice of the specific grounds upon which it intended to depart. Due process as protected under the Fifth Amendment requires both adequate notice and a meaningful hearing on the subject matter before the government can take, by way of a fine, property of a defendant. This constitutional law requirement is missing in the Second Circuit which appears to be an island unto itself among the several circuit courts.

CONCLUSION

Burns v. United States, supra, made it clear that before a sentencing hearings, the parties must be given advanced notice of its contemplation to depart. This notice must contain the specific grounds for any such departure; it is only through this process that a defendant (or the government) can have a meaningful hearing consistent with Due

Process of Law, requirements found in the Fifth Amendment. Additionally, Rule 32, Fed. Rules of Criminal Procedure, mandates this requirement.

The Second Circuit by its failure to properly construe the Burns case, properly apply Rule 32, and properly adhere to Due Process requirements has acted inconsistent with this Court, the rules of criminal procedure, and the various decisions issued by the other circuit courts. Additionally, the Court misapplied the Eleventh Circuit's ruling in applying the so called harmless error analysis by shifting the burden of proof and ignoring Due Process considerations. This makes their decision in the instant matter appropriate subject matter for granting the petition. This important concept presently has Second Circuit in conflict with this Court and the other

circuit courts of appeal.

Respectfully Submitted,

DOMINICK LOPREATO

RICHARD R. BROWN
His Attorney

KATE W. HAAKENSON
His Attorney

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APPENDIX

APPENDIX

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2. B-1 Rule 32,(b)(4)
Fed. Rules Crim. Proc. B-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1129—August Term, 1995

(Argued February 28, 1996 Decided May 8, 1996)

Docket No. 95-1485

UNITED STATES OF AMERICA,

Appellee,

—v.—

DOMINICK LOPREATO,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, MESKILL and WINTER,
Circuit Judges.

Appeal from the sentencing portion of a judgment of the United States District Court for the District of Connecticut, Daly, *J.*, imposing a sentence of 51 months incarceration and a $250,000 fine after a jury convicted

appellant of two counts of violating 18 U.S.C. § 1954, three counts of violating 26 U.S.C. § 7206(1), one count of violating 18 U.S.C. § 371 and two counts of violating 18 U.S.C. § 1621(1). Appellant contends that the district court erred in its determination that the money appellant received was a bribe rather than a gratuity. Appellant also claims the district court erred by calculating his sentence based on the full amount of the money lost by the pension fund of which appellant was a trustee, rather than on the amount of the unlawful payment received by appellant. Finally, appellant argues that the district court failed to give him notice, as required by Fed. R. Crim. P. 32, of its intention to impose the alternative fine. We affirm the sentence in all respects.

RICHARD R. BROWN, Hartford, CT (Brown, Paindiris & Zarella, Hartford, CT, of counsel), *for Appellant*.

THOMAS J. MURPHY, Assistant United States Attorney, District of Connecticut, New Haven, CT (Edwin J. Gale, Acting United States Attorney, Peter A. Clark, Assistant United States Attorney, District of Connecticut, New Haven, CT, of counsel), *for Appellee*.

MESKILL, *Circuit Judge*:

This is an appeal from the sentencing portion of a judgment of conviction following a jury trial by the United States District Court for the District of Con-

necticut, Daly, *J.* The district court sentenced appellant Dominick Lopreato to 51 months incarceration and fined him $250,000 for two counts of violating 18 U.S.C. § 1954, three counts of violating 26 U.S.C. § 7206(1), one count of violating 18 U.S.C. § 371 and two counts of violating 18 U.S.C. § 1621(1). Lopreato contends that the district court incorrectly (1) calculated his sentence by considering the money he received a bribe rather than a gratuity, (2) calculated his sentence based on the full amount of money invested and lost by the pension fund of which Lopreato was a trustee, and (3) failed to give him notice of its intent to impose an alternative fine as required by Fed. R. Crim. P. 32.

BACKGROUND

Dominick Lopreato served as Co-Chairman and Trustee of the Connecticut Laborers' Pension Fund (CLPF), an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(2) (ERISA). As such, he was subject to the strictures of 18 U.S.C. § 1954, which prohibits "an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan" from receiving, or agreeing to receive any "fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan." 18 U.S.C. § 1954(1).

On two occasions, the Board of Trustees of the CLPF, including Lopreato, voted unanimously to invest a total of more than $5 million in securities offered by the

Colonial Realty Company (Colonial). The CLPF never received a return on the investments and the principal was lost. Colonial is now in bankruptcy proceedings. The reason for this state of affairs is that the Colonial principals, Jonathan Googel and Benjamin Sisti, bled the company dry and looted it. It was not alleged that appellant knew of the fraudulent acts of Colonial and its principals.

Jonathan Googel pled guilty to two counts of wire fraud, in violation of 18 U.S.C. § 1343, one count of bank fraud, in violation of 18 U.S.C. § 1344, and one count of endeavoring to impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a). Judge Daly sentenced Googel to an eight year term of incarceration. Benjamin Sisti pled guilty to two counts of bankruptcy fraud, in violation of 18 U.S.C. § 152, one count of wire fraud, in violation of 18 U.S.C. § 1343, and one count of structuring transactions to avoid reporting requirements, in violation of 31 U.S.C. § 5324 and 31 U.S.C. § 5322. Judge Daly sentenced Sisti to a nine year term of incarceration.

The thrust of the government's case against Lopreato was that Colonial partner William Candelori contacted Lopreato and proposed that the CLPF invest in the Colonial Metro Zero Coupon Mortgage Trust (Metro Zero), a debt security which Colonial was then offering. In response, Lopreato informed Jonathan Googel, through their mutual friend, Ronald Welch, that the CLPF would invest in Metro Zero, but that Lopreato would have to be paid, in cash delivered by Welch. An agreement was reached that Colonial would pay Lopreato five percent of each such CLPF investment.

Thereafter, in May of 1988, Colonial made a sales presentation to the CLPF trustees, including Lopreato, and the CLPF trustees subsequently voted to invest $2 million in Metro Zero. After the CLPF's investment was made, Welch brought Lopreato $50,000 in cash, which was 5 percent, minus money given to Welch and other necessary participants.

Lopreato then informed Googel and Welch that he would arrange more CLPF investments, but that any money necessary to pay others could no longer be taken from his 5 percent. Googel agreed. In September 1989, the CLPF trustees, including Lopreato, voted again to invest in a Colonial offering—this time $3,094,734 in the Colonial Gold Zero Coupon Limited Partnership (Gold Zero). Subsequently, Welch brought $150,000 (5 percent of $3 million) in cash to Lopreato.[1]

The jury found that Lopreato violated 18 U.S.C. § 1954(1). Lopreato does not challenge his conviction, only his sentence. He challenges the finding of the district court at sentencing that he received a bribe rather than a gratuity. While the difference between a bribe and a gratuity does not affect the propriety of Lopreato's conviction under section 1954(1), a bribe commands

---

[1] At trial, evidence was offered that related to appellant's acts arranging for another pension fund, the Albany Laborers' Pension Fund (ALPF), to invest in the Colonial Constitution Zero Coupon Limited Partnership (Constitution Zero). Because the maximum increase under section 2F1.1 of the Sentencing Guidelines is 11 levels, corresponding to a net benefit of over $5 million, United States Sentencing Guidelines (Guidelines) § 2F1.1(b)(1) (1988), we need not count or discuss the Albany Laborers' investment because the two CLPF investments alone exceed $5 million. The appellant requested that the district court apply the 1988 Guidelines, and the court granted the request, partly because of concerns over *ex post facto* problems. The government concedes in its brief that the application of the 1988 Guidelines was proper. All further references to the Guidelines refer to the 1988 Guidelines.

a higher base offense level under the Sentencing Guidelines.

Lopreato also challenges the size of the increase in his offense level under United States Sentencing Guidelines (Guidelines) § 2E5.1(b)(2). That section instructs the sentencing court to increase the defendant's offense level incrementally, tying it to the "improper benefit" of the bribe to the payer. Lopreato contends that the court incorrectly used the total amount of money invested by the CLPF in the two Colonial investments, an amount in excess of $5 million. Lopreato claims the court instead should have increased his sentence level based on the amount of money he received from Colonial.

Finally, Lopreato challenges the district court's assessment of a $250,000 alternative fine without providing notice that it intended to do so, in contravention of Fed. R. Crim. P. 32 as interpreted by the Supreme Court in *Burns* v. *United States*, 501 U.S. 129 (1991).

DISCUSSION

A. *Standard of Review*

We review *de novo* the district court's interpretation of the Guidelines, and review the district court's factual findings for clear error. *United States* v. *Reese*, 33 F.3d 166, 174 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 756 (1995).

B. *Was the Unlawful Payment a Bribe or Gratuity?*

Lopreato challenges the district court's determination in setting a base offense level that he received a "bribe" rather than a "gratuity" as set out in the 1988 Guidelines.

Guidelines § 2E5.1(a). The Guidelines, in setting offense levels for those convicted under 18 U.S.C. § 1954, provide for a base offense level of six for receipt of a gratuity, but a base offense level of ten for receipt of a bribe. *Id.* The difference between receiving a bribe and receiving a gratuity is explained by Application Notes 1 & 2 and is reflected in the language of section 1954 itself.

Application Note 1 states that a bribe is "the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient." Guidelines § 2E5.1, app. note 1. A gratuity, according to Application Note 2, is "the offer or acceptance of an unlawful payment other than a bribe." Guidelines § 2E5.1, app. note 2.

The evidence at trial showed that Lopreato informed Colonial (through its representatives) that the CLPF would invest in Colonial's securities if Lopreato was paid. The evidence showed that thereafter Lopreato arranged for Colonial to pitch its securities to the CLPF trustees, and that subsequently, Lopreato and the other trustees voted in favor of investing. Immediately following each of the two CLPF investments, Welch delivered cash payments to Lopreato, as promised by Colonial's representatives and as demanded by Lopreato. This evidence fully supports Judge Daly's finding that these payments were bribes within the meaning of Guideline § 2E5.1(a)(1).

Appellant's primary argument challenging the court's finding that the payments to appellant were bribes is that the payments were made after appellant's acts of arranging each meeting for Colonial with the CLPF trustees and after appellant voted to approve each investment.

This "time of payment" argument is irrelevant under the language of section 1954 and flies in the face of a common sense interpretation of Application Note 2.

First, section 1954 criminalizes the receipt of money by an ERISA trustee "because of or with intent to be influenced." 18 U.S.C. § 1954. The "because of/with intent to be influenced" dichotomy corresponds with the bribe/gratuity dichotomy. *United States* v. *Roberto*, 801 F.Supp. 946, 953 (D. Conn. 1992) (referring to the "with intent to be influenced" language as the "*quid pro quo*" portion). Furthermore, the Background to Guidelines § 2E5.1 clearly indicates that the higher base level for receipt of a bribe applies "where the payment is the primary motivation for an action to be taken, as opposed to [a gratuity], where the prohibited payment is given *because of* a person's actions, duties, or decisions *without a prior understanding* that the recipient's performance will be directly influenced by the gift." Guidelines § 2E5.1, Background (emphases added); *see also United States* v. *Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (stating that "[t]he essential difference between a bribe and an illegal gratuity is the intention of the bribe-giver to effect a *quid pro quo*"); *United States* v. *Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (stating that the intent of the payer to influence the actions of the recipient is what distinguishes bribes from gratuities). The Guidelines clearly dictate that a promise to pay money, made before the unlawful act, with the understanding that the recipient will be influenced by the promise, is a bribe, not a gratuity. That is what happened here.

Second, it is unlawful to "agree[ ] to receive" payment with the intent to be influenced. 18 U.S.C. § 1954(1). The Colonial representatives promised to pay Lopreato

money in the future if he delivered the CLPF investment. Lopreato agreed to receive the money with the intent to influence the CLPF's decision whether to invest. This evidence is fully consistent with and supports a finding that Colonial's promise of future payment was itself a bribe.

Lopreato further argues he did not accept a "bribe" because a bribe requires corruption—and these investments, on their face, were legitimate. This argument misses the point. The corruption in this case stemmed from Lopreato's abandonment of his fiduciary obligations in exchange for money. Lopreato's vote in support of making the investments, fairly attributable to the promise of payment by Colonial and its representatives, supports a finding that the payments were bribes.

C. *What Was the Proper Amount to Consider Under Guidelines Section 2F1.1?*

Guidelines section 2E5.1(b)(2) instructs a sentencing court to increase a defendant's offense level "by the number of levels from the table in § 2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater." Guidelines § 2E5.1(b)(2). Application Note 4 of section 2E5.1 refers to section 2C1.1 for the definition of " '[v]alue of the improper benefit to the payer.' " Guidelines § 2E5.1, app. note 4. Application Note 2 of section 2C1.1, in turn, states that the value of the action received (the improper benefit) is the net value of such action, and illustrates the point with the following example:

> [I]f a $150,000 contract on which a $20,000 profit was made was awarded in return for a bribe, the value of the action received in return is $20,000.

Guidelines § 2C1.1, app. note 2. Judge Daly concluded that the net benefit to Colonial of the bribe was in excess of $5 million. This figure represented the two CLPF investments—one in Metro Zero, another in Metro Gold. Lopreato challenges the district court's determination that the full amount of the CLPF investments was a "net benefit" to Colonial. The determination of the amount of the "net benefit" is a factual question, reviewable only for clear error. *United States* v. *Hang*, 75 F.3d 1275, 1284 (8th Cir. 1996).

The first argument raised by Lopreato in various forms—that he did not intend $5 million in losses, that such a great loss was not foreseeable by him, that the district court looked to the wrong conspiracy—is that his sentence holds him vicariously liable for the fraudulent acts of Googel and his partners and is out of proportion with his culpability. This, he claims, is improper under section 2E5.1.

Unfortunately for Lopreato, the Guidelines do not require that he have intended or foreseen the losses he caused in this case. In fact, the Guidelines plainly and specifically assign punishment at a level higher than that which correlates to the amount of the bribe received, if the benefit to the bribe payer is greater than the bribe. Guidelines § 2E5.1(b)(2).

Where a defendant's sentence is imposed or enhanced based on the "relevant conduct" of co-conspirators, the prosecution must show that the co-conspirator's conduct was reasonably foreseeable to the defendant. The Sentencing Commission explicitly so stated. Guidelines § 1B1.3, app. note 2. This is not such a case. Section 2E5.1(b)(2) measures the harm caused by defendant's acts by measuring the benefit to the bribe-payer.

The section makes no mention of foreseeability, and the Commission clearly knew how to impose such a requirement.

Second, Lopreato urges us to find that the net benefit to the bribe payer in this case is indeterminable, because the profit made on the CLPF investment was not proven. Thus, Lopreato would have us order him resentenced under Guidelines § 2E5.1(b)(2), using the amount of money he received instead of the full amount invested by the CLPF. *See, e.g., Muldoon*, 931 F.2d at 289 (holding that where the profit made on a contract obtained through bribery is not determinable from the evidence, the amount of the bribe is the proper amount to use in increasing the offense level).

Appellant argues that the CLPF, in fact, received some value in exchange for its money—namely, a promise to repay the bond on certain conditions. However, under the circumstances of the Metro Zero and Metro Gold investments, it was not clearly erroneous for Judge Daly to conclude that, at the time of the investment, the securities had *no* value, that the CLPF did not and likely never would receive any money back from Colonial, and that the full amount of the CLPF investments was therefore the net benefit to Colonial and its principals.

Judge Daly's finding is supported by evidence that Googel and his partners were actively looting, and the collateral behind the securities was deeply subordinated. Indeed, at the time of the CLPF investment in the Gold Zero securities, the offering was oversubscribed—further diluting the already razor thin collateral. The government need not prove that the securities were totally worthless at the time of issuance to prove the full amount of the investments was a net benefit to Colonial

and its principals. Rather, the sheer unlikeliness of any return of the principal because of the ongoing illegal acts of the bribe payers was sufficient to support a finding that the entire investment was a net benefit to the bribe payers.

We need not rule on the government's argument that the net benefit to a borrower who repays nothing is *always* the full amount of the loan. It is clear from the evidence here that there was no benefit to the CLPF from Colonial's promise to repay. Lopreato delivered the CLPF's pension funds to the wolves, and cannot now distance himself from the carnage.[2]

D. *Was Lopreato Denied Notice of the Court's Intention to Impose the Alternative Fine?*

Lopreato also challenges the district court's imposition of the $250,000 alternative fine pursuant to 18 U.S.C. § 3571(b)(3), on the ground he was not given

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[2] Furthermore, the district court gave an alternative ground for sentencing appellant on the basis of the $5 million. It stated that it would have found that

> the lesser figure failed to adequately reflect the seriousness of [appellant's] offenses. In accordance with the background to Section 2E5.1, which provides, and I quote, "The seriousness of the offense is determined by several factors, including the value of the bribe or gratuity and the magnitude of the loss resulting in the transaction," I would have departed upward. In this case, the magnitude of the loss to the [CLPF], without considering the Albany transaction, exceeds five million dollars by almost a hundred thousand dollars. Thus, I would have departed upward to the same level upon which I am sentencing you.

Appellant challenges the propriety of this alternative ruling on the ground that he was not afforded prior notice of the court's intention to depart upward as required by Fed. R. Crim. P. 32. Because we affirm the district court's determination that the full amount of the CLPF investments was a "net benefit" to Colonial and its principals, we need not comment on the effect of any lack of prior notice on the propriety of the alternative ruling.

prior notice that the court was considering such a departure as required by Fed. R. Crim. P. 32. This argument relies on the Supreme Court's decision in *Burns*, 501 U.S. 129.

In *Burns*, the Court held that Rule 32 requires a sentencing court to provide the parties with prior notice of its intent to depart from the Guidelines *sua sponte*. *Id.* at 136. The Court explained that "[b]ecause the Guidelines place essentially no limit on the number of potential factors that may warrant a departure . . . , no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way." *Id.* at 136-37.

This case is somewhat different than *Burns* in that the presentence report (PSR) prepared by the probation officer indicated the alternative fine was available on these counts. In *Burns*, the sentencing court had *sua sponte* departed upward, when no grounds for doing so were listed in the PSR. *Id.* at 135. Thus Lopreato's invocation of *Burns* rings somewhat hollow. Indeed, the *Burns* Court distinguished "the ordinary case, [in which] the presentence report or the Government's own recommendation will notify the defendant that an upward departure will be at issue." *Id.* Although the PSR in this case stated only that the alternative fine was available, without supporting facts, Lopreato was significantly more aware the court might depart upward than was the defendant in *Burns*.

Regardless, even if notice was lacking under *Burns*, this error was harmless beyond a reasonable doubt. *See United States* v. *Paslay*, 971 F.2d 667, 674 (11th Cir. 1992) (applying harmless error analysis to district court's failure to give prior notice of upward departure).

The main argument Lopreato claims he would have made against imposition of the alternative fine had he been afforded notice was that he was already subject to lawsuits from the CLPF and Colonial's trustee in bankruptcy. However, the court clearly contemplated Lopreato's liability to Colonial's trustee in bankruptcy and to the CLPF. It stated, in choosing not to order restitution, that "in view of the fine and the bankruptcy trustee's claim, and because I do not want to make a preference out of the Union over any other claimant in the bankruptcy proceedings, I do not order that restitution be made." Any argument that the court did not consider Lopreato's other potential liabilities is belied by this statement. Thus, any error was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, the sentence imposed by the district court is affirmed and the judgment of conviction is affirmed.

APPENDIX B

Rule 32(b)(4), Fed. Rules Crim. Proc.

(4) **Contents of the Presentence Report.**

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence-within or without the applicable guideline-that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. §994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.A. § 3552(b); and

(G) any other information required by the court.